U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border Protection

June 21, 2019

DIS-3 OT:RR:RDL:FAPL
CBP-AP-2019-047669 KKV

Shawn Musgrave
411A Highland Avenue
Somerville, MA 02144

Re: Freedom of Information Act Appeal; Shawn MUSGRAVE
File: CBP-AP-2019-047669

Dear Mr. Musgrave:

This letter is in response to your correspondence received April 26, 2019, addressed to the U.S. Customs and Border Protection (CBP) Freedom of Information Act (FOIA) Appeals, Policy & Litigation Branch, which appeals the determination issued by the CBP FOIA Division (CBP-2018-013173) on March 19, 2019, that no responsive documents could be located because the responsive documents were under the jurisdiction of the DHS Office of Inspector General (DHS OIG). The original request, perfected on December 6, 2017, requested that CBP provide "[d]ata provided to the DHS OIG with regard to the agency's use of summonses under 19 U.S.C. 1509."

Your appeal states that you filed a similar FOIA request directly with the DHS OIG, and references documents released by OIG in response to your request which you infer are attached to your appeal. Specifically, you reference "an attached DHS OIG referral letter dated July 2, 2018, p4, indicating that 14 pages of responsive material were referred to CBP" and a ""MEMORANDUM OF ACTIVITY" (dated June 20, 2017) enumerating which CBP OPR offices provided pertinent data regarding issuance of 1509 summons (page 1), as well as analyzing this data (page 2)." Unfortunately, neither of these documents was attached. Accordingly, we attempted to contact you at the email address provided to CBP when the appeal was filed. No response was ever received.

To ensure that you receive all of the relevant records that CBP maintains about you, an attorney on my staff has conducted a de novo search for all responsive records. In the course of that search, we learned that although the DHS OIG had transmitted fourteen (14) pages of responsive documents to the FOIA Division for direct response to you, those responsive documents were not transmitted before the FOIA Division closed your initial request. Therefore, the 14 pages of records are hereby released with partial redactions in accordance with the FOIA, as set forth below.

The Freedom of Information Act (FOIA)

Congress enacted the FOIA in order "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[1] "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[2] The statute provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

The predominant objective of the FOIA is the disclosure to the public of executive branch information that is maintained by the Federal Government unless the requested records contain certain categories of information that are exempt or excluded from compelled disclosure. The FOIA provides nine exemptions and three exclusions pursuant to which an agency may withhold requested information. Thus, the public's right to government information is not without limits. However, FOIA exemptions are to be narrowly construed, and the burden is on the government to demonstrate that the materials sought may be withheld due to one or more of the exemptions that are set forth in 5 U.S.C. §552(b). In connection with your appeal, certain information that is contained in the responsive records is exempt from disclosure pursuant to the exemptions provided by sections (b)(6), (b)(7)(C) and (b)(7)(E) of 5 U.S.C. § 552.

The first two exemptions – (b)(6) and (b)(7)(C) - relate to the protection of personal privacy, and were invoked here only to protect the identity of CBP employees. A primary consideration is to protect CBP employees (and other individuals) from unnecessary "harassment and annoyance in the conduct of their official duties and in their private lives," which could conceivably result from the public disclosure of their identity.[3] Under the FOIA, privacy encompasses the "individual's control over information concerning his or her person."[4] To determine whether this information ought to be withheld under either exemption (b)(6) or (b)(7)(C), an agency must balance the privacy interests involved against the public interest in disclosure.[5]

Exemption (b)(6) – Personnel, Medical and Similar Files

Exemption (b)(6) permits the government to withhold information about an individual in "personnel and medical and similar files" when the disclosure "would constitute a clearly unwarranted invasion of personal privacy."[6] Examples of the types of information that can be withheld are the first and last name of CBP officers, telephone and email addresses, and personally identifying information (PII) belonging to third parties.

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1 *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted).
2 *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted).
3 *Nix v. U.S.,* 572 F. 2d 998, 1006 (4th Cir. 1978).
4 *Department of Justice v. Reporters Committee for the Press*, 489 U.S. 749, 763 (1989).
5 *Id.* at 762.
6 5 U.S.C. § 552(b)(6).

As a threshold requirement, Exemption (b)(6) can only be applied to "personnel and medical and similar files." However, the range of documents falling within these categories is interpreted broadly so as to include all government records "which can be identified as applying to that individual."[7] Once this threshold is met, the issue becomes whether disclosure of the information at issue "would constitute a clearly unwarranted invasion of personal privacy,"[8] an undertaking that requires balancing the privacy interests of the individual or individuals against the public interest in disclosure. The U.S. Supreme Court has determined that this balance is properly struck where "personal references or other identifying information [are] deleted."[9]

Once it has been determined that there is a substantial privacy interest under Exemption (b)(6), it is necessary to assess the public interest in disclosure.[10] In this regard, the Supreme Court limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: to "shed light on an agency's performance of its statutory duties."[11] The Supreme Court repeatedly has stressed that information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve."[12]

In connection with your appeal, we find that the information eligible for redaction pursuant to Exemption (b)(6) is properly exempt from disclosure because there is a significant privacy interest on the part of the subject individuals and there is little, if any, public interest in disclosure. Accordingly, we are invoking Exemption (b)(6) for this type of information in the record that we are releasing to you.

Exemption (b)(7)(C) – Law Enforcement Information and Records

In a similar manner, Exemption (b)(7)(C) is utilized to protect the privacy interests of all persons mentioned in law enforcement records, including investigators, suspects, witnesses, and informants. However, Exemption (b)(7)(C) contains even broader protections than Exemption (b)(6). Although the protections available under Exemption (b)(7)(C) are not the same as Exemption (b)(6), the analysis is similar in that it also requires the balancing of the privacy interests involved against the public interest in disclosure.[13] The two exemptions differ in the "magnitude of the public interest that is required" to overcome the privacy interests involved, with an extra weight in favor of redaction once exemption (b)(7)(C) privacy issues are implicated.[14]

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[7] *Department of State v. Washington Post*, 456 U.S. 595, 602 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966)).

[8] *Department of the Air Force v. Rose*, 425 U.S. 352, 373 (1976).

[9] *Id.* at 380.

[10] *Reporter's Committee*, *supra*, at 773.

[11] *Id.*

[12] *Id.* at 775. *See also*, *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997); *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

[13] *Lewis v. Department of Justice*, 609 F. Supp. 2d 80, 84 (D.D.C. 2009).

[14] *Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 496 n. 6 (1994).*

The privacy interest at play under Exemption (b)(7)(C) in protecting the third party information located in law enforcement documents is so strong that courts have found that such information is "categorically exempt" from production "unless access to the names and addresses of private individuals … is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity."[15]

> We have long recognized the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. [N]ot only the targets of law-enforcement investigations, but also 'witnesses, informants, and … investigating agents' have a 'substantial interest' in ensuring that their relationship to the investigations remains secret.[16]

Internal citations omitted.

Once the threshold requirement that the information found in "law enforcement" records is met and the privacy interests in Exemption (b)(7)(C) are triggered, the burden shifts to the requester to show government misconduct.[17] The showing must be "more than a bare suspicion" of official misconduct – it must "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."[18] Otherwise, the balancing requirement does not come into play.[19]

In connection with your appeal, we find that the information eligible for redaction pursuant to Exemption (b)(7)(C) is properly exempt from disclosure because such information is in a law enforcement record, there is a significant privacy interest on the part of the subject individuals, and there is no indication of government misconduct. Accordingly, we are invoking Exemption (b)(7)(C) for this type of information in the record that we are releasing to you.

Exemption (b)(7)(E)

Lastly, exemption (b)(7)(E) exempts from disclosure information that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.[20] Where the agency has a clear law enforcement mandate, it only need establish a rational nexus between enforcement of a federal law and the information withheld based on Exemption (b)(7).[21]

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15 *SafeCard Services, Inc. v. U.S. Securities & Exchange Commission*, 926 F.2d 1197, 1206 (D.C. Cir. 1991.

16 *Roth v. Department of Justice*, 2011 U.S. App. LEXIS 13124 (D.C. Cir. June 28, 2011).

17 *National Archives & Records Administration v. Favish,* 541 U.S. 157, 172 (2004).

18 *Id.* at 174.

19 *Boyd v. Department of Justice,* 475 F.3d 381, 388 (D.C. Cir. 2007).

20 *Fisher v. U.S. Department of Justice*, 772 F. Supp. 7 (D.D.C. 1991) (explicitly recognizing categorical protection for law enforcement techniques and procedures), aff'd 968 F.2d 92 (1992). *See also*, *Hammes v. U.S. Customs Service,* 1994 WL 693717 (unreported case) (S.D.N.Y.) (protecting criteria used to determine which passengers to stop and examine).

21 *Coastal Delivery Corporation v. U.S. Customs Service*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003).

In connection with your appeal, we find that the information eligible for redaction pursuant to Exemption (b)(7)(E) is properly exempt from disclosure because it reveals law enforcement techniques and methods for categorizing, navigating and/or identifying law enforcement records. Accordingly, we are invoking Exemption (b)(7)(E) for this type of information in the record that we are releasing to you.

Right of Appeal

The Freedom of Information Act provides requestors with the opportunity to seek judicial review of this administrative appeal. You may institute judicial review in the U.S. District Court in the district in which you reside, have a principal place of business, where the agency records are located, or in the United States District Court for the District of Columbia.

Additionally, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requestors and federal agencies as a non-exclusive alternative to litigation. *Using OGIS services does not affect your right to pursue litigation.* However, be aware that if you are requesting access to your own records, which is considered to be a Privacy Act request rather than a FOIA request, the OGIS does not have the authority to mediate requests made pursuant to the Privacy Act of 1974 (5 U.S.C. § 552a). You may contact OGIS in any of the following ways:

National Archives and Records Administration
Office of Government Information Services
8601 Adelphi Road
College Park, Maryland 20740-6001
Telephone: 202-741-5770
Toll Free: 877-684-6448
Facsimile: 202-741-5769
www.archives.gov/ogis

Sincerely,

Shari Suzuki

Shari Suzuki, Chief
FOIA Appeals, Policy, and Litigation
Regulations and Rulings
Office of International Trade

Enclosure